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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
SENSITIVE Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

RECEIVED
FEDERAL ELECTION
COMMISSION

2012 NOV 20 PM 3: 14

CELA

MUR: 6560
DATE COMPLAINT FILED: April 23, 2012
DATE OF NOTIFICATION: April 26, 2012
DATE ACTIVATED: July 24, 2012

EXPIRATION OF SOL: March 3, 2017

COMPLAINANT:

David Krikorian

RESPONDENTS:

Victory Ohio SuperPAC¹

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 433
2 U.S.C. § 434
2 U.S.C. § 441d(a)
11 C.F.R. § 100.22
11 C.F.R. § 100.26
11 C.F.R. § 100.28
11 C.F.R. § 109.10
11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED:

None

FEDERAL AGENCIES CHECKED:

I. INTRODUCTION

The Complaint alleges that the Victory Ohio SuperPAC violated the Federal Election Campaign Act of 1971, as amended, (the "Act") and Commission regulations when it made automated telephone calls ("robocalls") in March 2012. Victory Ohio SuperPAC is not registered with the Commission, or the Ohio Secretary of State.

¹ We could not notify Victory Ohio SuperPAC of the Complaint in this matter because we were not able to locate an address, telephone number, or any other contact information for the group, or identify any individual responsible for the entity.

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COMMISSION
SECRETARIAT
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1 The Complaint alleges that Victory Ohio SuperPAC was required to report as
2 independent expenditures the robocalls it made to voters in connection with the March 6, 2012,
3 Democratic primary election for the U.S. House of Representatives in Ohio's Second
4 Congressional District. The Complaint also alleges that Victory Ohio SuperPAC was required to
5 register and file reports with the Commission as a political committee.

6 For the reasons discussed below, we recommend that the Commission: (1) find reason to
7 believe that Victory Ohio SuperPAC violated 2 U.S.C. § 434 by failing to report the robocalls as
8 independent expenditures; (2) find reason to believe that Victory Ohio SuperPAC violated
9 2 U.S.C. § 441d(a) by failing to include a complete disclaimer in the robocalls; (3) find reason to
10 believe that Victory Ohio SuperPAC violated 2 U.S.C. §§ 433 and 434 by failing to register and
11 report with the Commission as a political committee; and (4) authorize the use of compulsory
12 process in this matter, including the issuance of appropriate interrogatories and document
13 subpoenas, as necessary, to determine the identity of those responsible for Victory Ohio
14 SuperPAC, to ascertain the cost, timing, and number of calls made, and to identify any other
15 activities that Victory Ohio SuperPAC conducted in connection with federal elections during the
16 2012 election cycle.

17 **II. FACTUAL AND LEGAL ANALYSIS**

18 **A. Facts**

19 The Complaint alleges that from approximately March 3, 2012, until March 6, 2012,
20 Democratic voters in Ohio's Second Congressional District received robocalls in connection
21 with the March 6, 2012, Democratic primary election urging them to vote for Barack Obama for
22 President, Sherrod Brown for Senate, and William Smith for Congress. Compl. at 2. The
23 robocalls stated:

1 We're calling all Democrats and reminding them to cast your ballot for
2 President Obama and Senator Brown on Tuesday. Also vote for William
3 Smith for Congress. William Smith has an opponent that describes himself as
4 a Reagan Conservative. William Smith's opponent was already sanctioned by
5 the Ohio Elections Commission for not telling the truth. Please don't make a
6 mistake and embarrass the party. Vote for William Smith, the real Democrat
7 for Congress. This has been paid for by the Victory Ohio SuperPAC.

8
9 *Id.* The Complaint includes audio recordings of two versions of the robocall: a longer version
10 using the script above and a shorter version that omits the first two sentences of the script.

11 Compl., Ex. A.

12 According to a press article cited in the Complaint, the telephone number associated with
13 the robocalls was "a non-working phone number from the Cleveland suburbs." See Gregory
14 Korte and Fredreka Schouten, *Mystery Super PAC May Have Violated Election Law*, USA
15 TODAY, Mar. 9, 2012, available at [http://usatoday30.usatoday.com/news/politics/story/2012-03-](http://usatoday30.usatoday.com/news/politics/story/2012-03-09/william-smith-ohio-super-PAC/53439752/1)
16 [09/william-smith-ohio-super-PAC/53439752/1](http://usatoday30.usatoday.com/news/politics/story/2012-03-09/william-smith-ohio-super-PAC/53439752/1) (Compl., Ex. B).³ The article posits that the
17 Victory Ohio SuperPAC robocalls may have been the determining factor in the Democratic
18 primary election where William Smith, "a candidate who didn't campaign," won by 59 votes
19 against Complainant David Krikorian, who raised more funds than Smith and had the
20 endorsement of major Democratic groups. *Id.*

21 The Complaint alleges that Victory Ohio SuperPAC failed to report the cost of the
22 robocalls as independent expenditures in support of the three identified federal candidates.

³ Through publicly available information, we were able to identify a telephone number associated with the robocalls. The robocalls were the subject of a Huffington Post article that linked to a YouTube posting of the short version of the robocall. See Matt Sledge, *Ohio Super PAC Under Review by U.S. Attorney for Robocalls*, HUFFINGTON POST, Mar. 13, 2012, http://www.huffingtonpost.com/2012/03/13/ohio-super-pac-us-attorney-robocalls_n_1342880.html. The YouTube posting contains audio of the robocall with the on-screen message, "Call from mysterious PAC, not registered with FEC, received 3/3/12 from number 440-429-9200." See http://www.youtube.com/watch?v=ThMnYF26GeU&list=UUZ1XO0xOmg0Pz9I3aMOZVcw&index=5&feature=plpp_video. Although we found no public listing for the person or entity associated with the telephone number identified in the YouTube posting, an online subscription database identifies the telephone number as a Kirtland, Ohio cellular telephone number serviced by Alltel Communications, Inc.

1 Compl. at 3. The Complaint asserts that the robocalls cost over \$1,000 and that Victory Ohio
2 SuperPAC was required to report the expenditures within 24 hours of dissemination. *Id.* at 4.
3 The Complaint also asserts that the Victory Ohio SuperPAC is a political committee and failed to
4 file a Statement of Organization and quarterly financial disclosure reports with the Commission.
5 *Id.* at 3-5.

6 **B. Legal Analysis**

7 1. Independent Expenditure Reporting

8 Victory Ohio SuperPAC was likely required to report the robocalls as independent
9 expenditures. A political committee must report its independent expenditures and must itemize
10 each disbursement that aggregates over \$200 during a calendar year in connection with an
11 independent expenditure. 2 U.S.C. § 434(b). Further, every person other than a political
12 committee who makes independent expenditures over \$250 in a calendar year must also file an
13 independent expenditure report. 2 U.S.C. § 434(c); 11 C.F.R. § 109.10(b). Any person,
14 including a political committee, who makes independent expenditures aggregating \$1,000 or
15 more after the 20th day, but more than 24 hours, before the day of an election must report the
16 independent expenditures within 24 hours. 2 U.S.C. § 434(g)(1); 11 C.F.R. § 109.10(d). Any
17 person, including a political committee, who makes independent expenditures aggregating
18 \$10,000 or more at any time during a calendar year, up to and including the 20th day before an
19 election, must report the independent expenditures within 48 hours. 2 U.S.C. § 434(g)(2);
20 11 C.F.R. § 109.10(c).

21 The Act defines an "independent expenditure" as any expenditure that expressly
22 advocates the election or defeat of a clearly identified candidate and is not made in concert or
23 cooperation with or at the request or suggestion of a candidate, a political party committee, or

1 their respective agents. 2 U.S.C. § 431(17). A communication contains "express advocacy,"

2 when it

3 uses phrases such as "vote for the President," "re-elect your Congressman," "support the
4 Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in
5 Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-
6 Choice" accompanied by a listing or clearly identified candidates described as Pro-Life or
7 Pro Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or
8 more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or
9 individual word(s), which in context can have no other reasonable meaning than to urge
10 the election or defeat of one or more clearly identified candidate(s), such as posters,
11 bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76,"
12 "Reagan/Bush" or "Mondale!"

13
14 11 C.F.R. § 100.22(a).

15 Here, both versions of the robocall contain express advocacy under 11 C.F.R.

16 § 100.22(a). The longer version of the call exhorts listeners to "cast your ballot for President

17 Obama and Senator Brown on Tuesday" and to "vote for William Smith for Congress." The

18 shorter version of the call exhorts voters to "Vote for William Smith, the real Democrat for

19 Congress." Compl. at 2. In addition, it appears reasonably likely that the calls cost more than

20 \$250. Thus, there is reason to believe that the payments for them should have been disclosed as

21 independent expenditures.⁴

⁴ The Commission has previously dismissed matters upon concluding that the cost of the activity did not warrant further action. *See, e.g.*, Certification at 2 (Oct. 21, 2011), MUR 6137 (Informed Catholic Citizens) (closing file and authorizing letter of caution after post-investigation recommendation of the Office of General Counsel to take no further action and issue admonishment letter). In this matter, it is premature to conclude that the potential amount in violation warrants dismissal as a matter of prosecutorial discretion. To the contrary, there is reason to conclude that the cost of the robocalls may justify further Commission action following investigation. Based on internet sources, robocalls average from two to seven cents or more per call, depending on the duration, quantity, and quality of the call. *See, e.g.*, <http://republicanrobocalls.org/4.html>. At this time, we do not know how many households or registered voters in the Second Congressional District were called, how often, or how much the calls cost. According to the Ohio Secretary of State, the Second Congressional District had over 40,000 registered Democrats and almost 500,000 total registered voters in the 2012 election cycle. *See* <http://www.sos.state.oh.us/sos/elections/Research/electResultsMain/2012results/2012precincts.aspx>. Given the number of registered voters in that district, the amount in violation could be several thousand dollars. Once we conduct a brief investigation, however, we will be in a position to answer these questions definitively.

1 An investigation is required to determine the individuals responsible for Victory Ohio
2 SuperPAC's robocalls and to ascertain the cost, timing, and number of calls made.⁶ The identity
3 of the telephone service provider we have located provides a clear and straightforward lead
4 concerning the source of the robocalls. As such, this matter is distinguishable from matters the
5 Commission dismissed without investigation because it lacked any evidence likely to reveal the
6 identity of the party responsible for the apparent violation.⁷ Accordingly, we recommend that
7 the Commission find reason to believe that Victory Ohio SuperPAC violated 2 U.S.C. § 434 by
8 failing to file one or more independent expenditure reports.

9 2. Disclaimers

10 As a consequence of finding reason to believe that the robocalls should have been
11 disclosed as independent expenditures, there is reason to believe that the robocalls contained
12 inadequate disclaimers. The Act and Commission regulations require certain types of
13 communications to include disclaimers. 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11. A disclaimer is
14 required, for example, on all public communications, by any person, that expressly advocate the
15 election or defeat of a clearly identified candidate. 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(a)(2).
16 Such communications, if not authorized by a candidate, must clearly state the name and
17 permanent street address, telephone number, or World Wide Web address of the person who paid

⁶ Because the robocalls contained express advocacy, they were required to be disclosed as independent expenditures regardless of the type of entity that engaged in the speech. Therefore, matters in which the Commission failed to approve investigations because of the lack of specific information concerning the responsible party's status are inapposite. *See, e.g.*, MUR 6429 (Unknown Respondents) (Commission, by 2-3 vote, unable to approve recommendation to investigate to learn the type of entity that paid for mailers and phone calls that did not contain express advocacy); MUR 6441 (Unknown Respondents) (same, by 3-3 vote, as to bulk mailers).

⁷ *See, e.g.*, MUR 6135 (Unknown Respondents) (EPS) (dismissing for prosecutorial discretion where Office of General Counsel was unable to identify any individual associated with phone calls); MUR 5455 (Unknown in South Dakota) (EPS) ("[W]ithout the last four digits of the phone number where the calls emanated from it was unlikely that an investigation would ultimately reveal the source of the calls.").

1 for the communication and state that the communication is not authorized by any candidate or
2 candidate's committee. 2 U.S.C. § 441d(a)(3); 11 C.F.R. § 110.11(b)(3).

3 A "public communication" includes a communication by "telephone bank to the general
4 public." 2 U.S.C. § 431(22); 11 C.F.R. § 100.26. A "telephone bank" means "more than 500
5 telephone calls of an identical or substantially similar nature within any 30-day period."

6 2 U.S.C. § 431(24); 11 C.F.R. § 100.28. Telephone calls are "substantially similar" when they
7 "include substantially the same template or language, but vary in non-material respects such as
8 communications customized by the recipient's name, occupation, or geographic location."

9 11 C.F.R. § 100.28.

10 The disclaimer requirements of 2 U.S.C. § 441d(a) likely apply to the robocalls at issue
11 here, because the calls likely constitute a "telephone bank to the general public" and thus a
12 "public communication," and because they expressly advocate the election of clearly identified
13 candidates for federal office. Although we do not have specific information about the precise
14 volume of robocalls, as previously discussed, the available information and the allegations in the
15 Complaint support an inference that over 500 substantially similar calls were made. Thus, the
16 Victory Ohio SuperPAC robocalls likely required disclaimers.

17 Finally, the disclaimers in the robocalls failed to comport with the requirements of the
18 Act. The disclaimer stated, "This has been paid for by the Victory Ohio SuperPAC," but failed
19 to include an address, telephone number, or website address for the group and to state whether
20 the communication was authorized by a candidate or political committee.⁸ Therefore, we
21 recommend that the Commission find reason to believe that Victory Ohio SuperPAC violated
22 2 U.S.C. § 441d by failing to include a complete disclaimer in the robocalls.

⁸ Although this potential violation was not specifically articulated in the Complaint, it flows directly and unavoidably from the nature of the communication described in the Complaint.

3. Political Committee Status

Under the Act, groups that are political committees are required to register with the Commission and publicly report all of their receipts and disbursements. 2 U.S.C. §§ 433, 434. The Act defines a “political committee” as any committee, club, association, or other group of persons that receives “contributions” or makes “expenditures” that aggregate in excess of \$1,000 during a calendar year. *Id.* § 431(4)(A). The term “contribution” includes “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.” *Id.* § 431(8)(A)(i). The term “expenditure” includes “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.” *Id.* § 431(9)(A)(i). In addition, an organization that is not under the control of a candidate is a “political committee” only if its “major purpose” is the nomination or election of federal candidates. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *see also FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986); Political Committee Status, 72 Fed. Reg. 5,595, 5,597 (Feb. 7, 2007) (supplemental explanation and justification).

As discussed above, there is reason to believe that Victory Ohio SuperPAC made expenditures for robocalls that contained express advocacy. It is reasonably likely that these expenditures were in excess of the \$1,000 statutory threshold for expenditures required for political committee status. *See* 2 U.S.C. § 431(4)(A). The Complaint and publicly available information provide no evidence of an activity of Victory Ohio SuperPAC other than making these robocalls — which expressly advocated the election of federal candidates. Thus, there is reason to believe that Victory Ohio SuperPAC had as its major purpose the nomination and election of federal candidates.

1 An investigation would allow us to determine whether Victory Ohio SuperPAC
2 conducted other activities that could affect whether the group had the requisite major purpose for
3 political committee status. Accordingly, we recommend that the Commission find reason to
4 believe that Victory Ohio SuperPAC violated 2 U.S.C. §§ 433 and 434 by failing to register and
5 report as a political committee.

6 **III. INVESTIGATION**

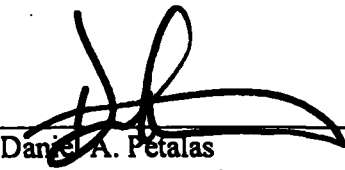
7 We seek authorization to conduct a limited investigation to determine the identity of the
8 individuals responsible for the Victory Ohio SuperPAC; to ascertain the cost, timing, and
9 number of calls made; and to identify any other activities Victory Ohio SuperPAC conducted in
10 connection with federal elections during the 2012 election cycle. Therefore, we recommend that
11 the Commission authorize the use of compulsory process, including subpoenas for answers to
12 written questions, production of documents, and depositions, as necessary.

13 **IV. RECOMMENDATIONS**

- 14 1. Find reason to believe that Victory Ohio SuperPAC violated 2 U.S.C. § 434;
- 15
- 16 2. Find reason to believe that Victory Ohio SuperPAC violated 2 U.S.C. § 441d(a);
- 17
- 18 3. Find reason to believe that Victory Ohio SuperPAC violated 2 U.S.C. §§ 433 and 434;
- 19
- 20 4. Approve the attached Factual and Legal Analysis;
- 21
- 22 5. Authorize the use of compulsory process in this matter, including the issuance of
- 23 appropriate interrogatories, and document subpoenas, as necessary; and

6. Approve the appropriate letters.

Anthony Herman
General Counsel



Daniel A. Petalas
Associate General Counsel
for Enforcement

11/20/22

Date



Kasey S. Morgenheim
Attorney

UNRECORDED